great care, I held that the *'court'* had raised a reasonable doubt as to the prosecution case upon a balance of probabilities." (I take it that the use of the word "court" by the learned magistrate is a mistake and what he meant to say was "defence" instead). They should state briefly what were the matters they *considered* (and this involves both law and facts), what was the *care* they exercised and what was the *doubt* created in the mind and how it was *reasonable*. The law requires them to give the *grounds* of their decision and not an empty or superficial gloss over the decision itself.

The respondents were charged under section 22(1) of the Control of Supplies Act 1961. Section 22(1) deals with the commission of an offence by any person other than a body corporate but includes a director or officer of a body corporate. Section 8 of the Co-operative Societies Ordinance 1948 renders a registered Co-operative Society a body corporate and no doubt the word "person" as defined in the Penal Code and the Interpretation and General Clauses Act 1967 includes a body corporate, yet section 22(1) of the Control of Supplies Act 1961 expressly excludes a body corporate from its scope and ambit. An offence committed by a body corporate can only fall under section 22(2) of the Control of Supplies Act 1961. The charge was not against an officer of the respondent society but against the respondents as a co-operative society and I am of the view that the charge should have been under section 22(2) and not under section 22(1) of the Control of Supplies Act 1961.

In the result the appeal is allowed and the order of the learned magistrate set aside. The charge will be amended to one under section 22(2) of the Control of Supplies Act 1961. I could have dealt with the matter here but as the respondents have a right to recall any of the prosecution witnesses the case will be sent back to the magistrate with a direction to amend the charge and to decide the case on its merits after giving an opportunity to the respondents to recall any of the prosecution witnesses, if they so desire, and to produce any evidence which they may desire to produce in support of their defence.

Appeal allowed.

Solicitors: *Stanley Ponniah, Ng & Soo.*

JAGATHESAN v. LINGGI PLANTATIONS LTD.*

[F.C. (Ong Hock Thye C.J. (Malaya), Suffian & Ali F.JJ.) July 26, 1967]

[Kuala Lumpur — Federal Court Civil Appeal No. X.102 of 1966]

Contract — Construction of written agreement — Agreement for sale of land — Payment of sum by way of deposit and part payment — Provision that in case of default the amount paid shall be forfeited to account of damages for breach of contract — Whether amount recoverable by purchaser in case of default — Proof of damages — Contracts (Malay States) Ordinance, 1950, ss. 74 & 75.

Land Laws — Agreement for sale of land — Sale not completed according to agreement — Whether deposit can be forfeited.

This was an appeal against the decision of the High Court ([1967] 1 M.L.J. 177). The appellant had agreed to purchase rubber lands for the price of $3,775,000 and had paid $377,500 under the agreement "by way of deposit and part payment." It was provided in the agreement that if there was default in completing the sale by the purchaser the amount paid by the purchaser "shall be forfeited to account for damages for breach of contract." The appellant failed to complete the contract within the time stipulated. The respondents thereupon rescinded the contract and forfeited the deposit. The appellant claimed the return of the sum of $377,500 paid by him. The learned trial judge dismissed the claim. It was contended on appeal that as the agreement provided for the forfeiture of the sum of $377,500 "to account of damages for breach of contract", the learned judge should have considered whether the sum was a genuine pre-estimate of damages; and as in this case there was no evidence that the respondents had suffered any damage the appellant should have been granted equitable relief.

Held, allowing the appeal (1) on a true construction of the agreement it was intended that the sum of $377,500 should be forfeited to account of damages, so that the vendor could have claimed more if it turned out that the sum was inadequate as compensation for their loss; and where as here the vendor had sustained little or no damage by reason of the breach of contract, the purchaser was entitled to claim a refund of any sum in excess of such damage;

(2) the sum paid in this case was not earnest money and therefore the vendor was not entitled to forfeit it on breach of the contract by the purchaser and was entitled to reasonable compensation as damages for such breach.

Cases referred to:—

(1) *Maniam* v. *State of Perak* [1957] M.L.J. 75.

(2) *Howe* v. *Smith* (1884), 27 Ch.D. 89.

(3) *Tay Say Geok* v. *Warren* [1963] M.L.J. 179, 187, affirmed by the Privy Council, [1965] 1 M.L.J. 44.

(4) *Subramaniam* v. *Public Prosecutor* [1956] M.L.J. 220, 222.

(5) *Wallis* v. *Smith* (1882), 21 Ch.D. 243, 258.

(6) *Mussen* v. *Van Diemen's Land Co,* [1938] 1 All E.R. 210.

(7) *Stocklower* v. *Johnson* [1954] 1 All E.R. 630.

(8) *Natesa Aiyar* v. *Appavu Padayachi* A.I.R. 1915 Mad. 896.

*Leave to appeal to the Privy Council had been granted.

(9) *Manian Pattar* v. The *The Madras Railway Company* I.L.R. [1906] 29 Mad. 118.

(10) *Bhai Panna Singh* v. *Bhai Arjun Singh* A.I.R. 1929 P.C. 179, 180.

(11) *Ford* v. *Beech* (1848). 11 Q.B. 852, 856.

(12) *Fateh Chand* v. *Balkishan Dass* A.I.R. 1963 S.C. 1405.

(13) *Naresh Chandra* v. *Ram Chandra* A.I.R. 1952 Cal. 93.

(14) *Chiranjit Singh* v. *Har Swarup* A.I.R. 1926 P.C. 1; [1926] M.W.N. 145, P.C.

(15) *Moal Chand Behari Lal* v. *S.D. Chand & Co.* A.I.R. 1947 Lahore 112.

(16) *Murlidhar Chatterjee* v. *International Film Co. Ltd.* L.R. 70 I.A. 35; A.I.R. 1943 P.C. 34.

(17) *Mayson* v. *Clouet & Anor.* [1924] A.C. 980.

FEDERAL COURT.

Dato' Eusoffe Abdoolcader (*Abdul Rahim Noor* with him) for the appellant.

D.G. Rawson for the respondents.

Cur. Adv. Vult.

Ong Hock Thye C.J.: "It is abundantly clear from the authorities that, where in a contract between vendor and purchaser a sum is deposited by the purchaser by way of guarantee or security for the performance of the contract of sale and time is of the essence of the contract, the purchaser, if he fails to be ready with the purchase money at the essential time, cannot recover the deposit if it bears a reasonable proportion to the purchase price and there is a stipulation in the contract as regards forfeiture". So said Gill J. (as he then was). This is an appeal against his decision dismissing the appellant's claim for the return of $377,500 which had been received by the respondents "by way of deposit and part payment" upon the execution of a contract for the sale of their rubber lands at the price of $3,775,000. The appellant was in fact the assignee of the original purchaser, but nothing turns on the assignment. He died while this appeal was pending and his representative has been substituted, but I shall refer to him as the appellant herein.

Time was of the essence of the contract and the sale was to be completed in 90 days. The appellant being unable to pay the balance of the purchase price on due date, the respondents on August 27, 1962 rescinded the contract, as they were fully entitled to do, and forfeited the deposit "to account of damages for breach of contract".

On April 4, 1963 the appellant's solicitors wrote to the solicitors for the respondents requesting to be advised what those damages were, with particulars of how they were arrived at and how much was claimed by the respondents as deductible from the total sum of $377,500 which had remained on deposit with them. The material portion of the reply dated April 9, 1963 was as follows:—

"The sum of $377,500 was the deposit and that deposit has been forfeited. It follows, therefore, that we do not agree that the sum of $377,500 still remains in deposit with our clients. All our clients have to do is to give credit for this amount should they decide to claim for any additional sum".

On April 19, 1963 the appellant commenced action for a declaration that the forfeiture of the deposit was void as being a penalty, for assessment of the damages suffered in fact by the respondents and other reliefs. In the statement of claim the matters put in issue were as follows:—

"7. The plaintiff avers that the defendants have not suffered damage as a result of the breach of contract to the extent of the amount of the deposit and puts the defendants to proof of the damage that they have in fact suffered.

8. The plaintiff further avers that the forfeiture of the deposit operates in fact, and was intended to operate, as a penalty and is thus void".

The defence, besides traversing the above allegations, stated, in paragraph 6:—

"Alternatively, if (which is denied) the defendants by reason of the plaintiff's admitted breach of contract have not suffered damage to the extent of the amount of the said deposit as therein alleged, the defendants will contend that they were nevertheless entitled under the terms of the said agreement to forfeit the said deposit the same being a reasonable amount".

In paragraph 8 the respondents stated, further and in the alternatve, that they had suffered damage in excess of $377,500 and were thereby entitled to retain the said sum. Then followed the counterclaim, alleging damages suffered by them, as follows:—

"PARTICULARS

Contract price of the said land	$3,775,000
Market price of the said land as at the date of the termination of the said agreement	3,045,610
	$ 729,390

The defendants will give credit against such amount for such sum as they may be held entitled to retain by way of deposit forfeited".

I take it that by the last paragraph the respondents meant that the deposit would have to be set off against whatever amount might be found to be the damages sustained.

By his reply and defence to the counterclaim the appellant joined issue with the respondents on their defence and in answer to the counterclaim denied that the respondents had suffered damage in the sum of $729,390 as alleged or any damage at all and put them to strict proof thereof.

I think the twin issues raised in the pleadings are clear enough. In opening his case counsel for the appellant said it had been agreed on both sides that the preliminary point of law should be decided first and thereafter the question whether any evidence should be led on the pleadings. The point of law, as he phrased it, was "whether the deposit was made by way of security for completion or by way of damages". In either case deposits were caught under sections 65 and 75 of the Contracts (Malay States) Ordinance, 1950.

On the question of fact counsel submitted that (i) if the respondents contended that they were entitled to claim, by way of damages, more than the amount of the deposit, as stated in their solicitors' letter of 9th April, 1963 then the whole question of damages remained open; (ii) if the deposit was to be forfeited purely and simply as damages, then it was caught under section 75 and, even so, damages had to be assessed; (iii) the magnitude of the amount, rather than its relation to the purchase price, should be considered in assessing a reasonable sum for forfeiture.

Counsel for the respondents, on the other hand, contended that sections 65, 74 and 75 had no bearing on this case. It was not a case of the vendors suing the purchaser, but the purchaser asking for the return of moneys forfeited, as in *Maniam* v. *State of Perak*.[1] The appellant was seeking relief in equity against forfeiture, not the enforcement of a legal right, and courts would not interfere if the amount was reasonable, see *Howe* v. *Smith*.[2] Furtheremore, the deposit was forfeited "to account of damages", as expressly stipulated in the contract. Using any other words would have limited damages to the amount forfeited, whereas the words used permitted the vendor to claim damages over and above the amount forfeited, in which case, it was conceded, the additional damage would have to be proved. The words used were intended to preserve the vendor's right to sue for damages, should he consider the deposit insufficient. The deposit, being only 10 per cent of the purchase price was the normal deposit in sales of land and so held in *Tay Say Geok* v. *Warren*.[3]

At this stage of the arguments counsel for the appellant intimated that, whatever the answer to the point of law, he proposed to call evidence to show that the respondents in fact suffered no damage. He followed up by calling the appellant as witness. The testimony included a conversation with one Modliar Lingam (since deceased), of an estate agency firm in Singapore, who told the appellant, some time after the rescission of this contract, that he was trying to purchase the same estate on behalf of a client, but the negotiations fell through because the respondents demanded a far higher price than the price at which the appellant himself had contracted to buy the estate from them. Such evidence of a statement by a deceased person, though of doubtful admissibility under section 32 of the Evidence Ordinance as to the substance thereof, would however, properly be evidence that such a conversation did take place as alleged: see *Subramaniam* v. *Public Prosecutor*.[4] It led to the introduction of certain relevant letters in evidence relating to the market value of the estate, which are reproduced below:—

"EAP/H/BDS/32908 9th February, 1963

The General Manager,
Messrs. Guthrie Agency (Malaya) Ltd.,
No. 4, Jalan Mountbatten.
Kuala Lumpur.

Dear Sir,

Re: Linggi Plantation — Haron Estate.

We are acting on behalf of certain clients who are interested in the purchase of the above property.

We shall be obliged if you will let us know whether it is intended to sell the property and, if so, could you please advise us of the price required and also the terms for the sale.

Yours faithfully,
Sd. Donaldson & Burkinshaw."

"GUTHRIE AGENCY (MALAYA) LTD.
4. Jalan Mountbatten,
Kuala Lumpur.

EAP/H/BDS/32908 P.S. 198

IVS/JKC P. 4(a) 12th February, 1963.

Messrs. Donaldson & Burkinshaw,
Mercantile Bank Chambers, ,
Singapore, 1.
Dear Sirs,

Linggi Plantations Ltd. — Haron Estate.

We thank you for your letter of the 9th February, 1963. It is not in fact the intention of the directors to sell Haron Estate and we cannot, therefore, advise of details relating to any price required or terms of sale.

Naturally should your clients wish to make an offer for the estate we would provided the offer was of a sufficiently attractive nature, pass this on to our principals. In this connection and for your guidance, we may say that the offer recently made and accepted (which fell through owing to non-compliance by the prospective purchaser) was for 3¾ million dollars, and since further area have come into bearing since that offer was made and accepted, we feel that the directors would certainly not consider any sum not appreciably higher than that quoted above.

Yours faithfully,
for Guthrie Agency (Malaya) Ltd.
Director

As Agents: Linggi Plantations Ltd."

The appellant closed his evidence with a statement that he had gone to London expressly to obtain an extension of time; he had been anxious to complete because he knew that the estate could be resold at a higher price.

No evidence was called on behalf of the respondents, counsel submitting that the appellant's evidence did not carry the matter any further. In the result the counterclaim was abandoned. No evidence of the market value of the estate at the date of the breach was produced and the nearest thing to it was the respondents' own valuation of their property on February 12, 1963, less than 6 months after the breach.

At the beginning of this judgment I have quoted the grounds of decision as summarised by the learned trial judge himself. In short, the purchaser in default cannot recover his deposit if it bears a reasonable proportion to the purchase price and there is a stipulation for its forfeiture. This is fully in accord with English authorities, as thus expressed earlier in his judgment —

"In view of the nature of the plaintiff's case, the main question to be decided is whether, in all the circumstances of the case, he is entitled to any *relief from forfeiture* of his deposit. The answer to that question depends upon whether the deposit paid under the agreement is to be regarded as a *penalty or liquidated damages.*"

He then proceeded to consider four English cases on the point: *Wallis* v. *Smith,*[5] *Howe* v. *Smith,*[2] *Mussen* v. *Van Diemen's Land Co.*[6] and *Stockloser* v. *Johnson,*[7] followed in *Tay Say Geok* v. *Warren,*[3] the last-named being one in which the English law of contract also applied, as relating to land in the State (formerly Colony) of Malacca.

Referring next to Indian cases on section 74 of the Indian Contract Act he said: "It has been held in the Indian Courts again and again that sections 64 and 74 of the Indian Contract Act (sections 65 and 75 respectively of our Ordinance) do not apply to such deposits". In support of this proposition he cited *Natesa Aiyar* v. *Appavu Padayachi* [8] and *Manian Patter* v. *The Madras Railway Company,*[9] which latter case was followed by Thomson J. (as he then was) in the Malayan case of *Maniam* v. *State of Perak.*[1] There the judge had said:—

"In the first place, in this country there is no difference between penalty and liquidated damages. . . . As is said in *Pollock & Mulla* on the Indian Contract Act (7th Ed. p. 410) 'This section (74) boldly cuts the most troublesome knot in the Common Law doctrine of damages. In brief, in our law in every case, if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty; see *Bhai Panna Singh* v. *Bhai Arjun Singh.*" [10]

Having held, however, that in the instant case sections 65 and 75 of the Contracts (Malay States) Ordinance had no application to deposits by way of guarantee or security, the judge went on thus:—

"It is immaterial whether the operative words as regards forfeiture are that the deposit 'shall be retained by the vendor as liquidated damages' or that it 'shall be considered as liquidated damages' or that it 'shall be forfeited to the vendor to account of damages for breach of contract'."

It will now be convenient to turn to the grounds of this appeal, of which the substantial ones are: (a) that since clause 5 provided for forfeiture of the $377,500 to the vendors "to account of damages for breach of contract", the judge consequently should have considered whether that sum was in fact a genuine covenanted pre-estimate of damage; (b) that the $377,500 having been expressed in clause 1 to have been paid, not only by way of deposit, but also in part payment of the purchase price, the proportion representing part payment should have been recoverable; (c) that forfeiture of this whole amount was of a penal nature, was intended to, and did in fact operate, as a penalty, and was accordingly void; and (d) that, on the evidence, the respondents had suffered no damage, so that any award would have been only for a nominal sum and the appellant should have been granted equitable relief.

Rather than discuss any of the above grounds in particular, I think it is of first importance to consider the proper construction of the provisions under which the deposits were paid to the respondents and purported to be forfeited by them. The cardinal rule of construction of the terms of a written agreement is to discover therefrom the intention of the parties to such agreement. They are presumed to have intended what they said. "The common and universal principle is that an agreement ought to receive that construction which its language will admit, which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent": see *Ford* v. *Beech* [11] *per* Parke B.

With all respect to the learned trial judge, it would appear that the question of law had been over-emphasised. In the result preoccupation with the legal complexities had outweighed the proper construction of the contract. In clause 1 the purchase price was agreed at $3,775,000 "whereof the vendor's agents . . . . have prior to the execution of these presents received the sum of $377,500 by way of deposit and part payment". It will be observed that, unlike *Fateh Chand* v. *Balkishan Dass,*[12] to which I shall refer in more detail later, there was no apportionment of any definite sum by way of deposit. The clause had to be read, of course, with clause 5 on forfeiture, which is as follows:—

"If due to any act or default of the purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of $377,500 (Dollars Three hundred and seventy seven thousand five hundred) referred to in clause 1 hereof shall be forfeited to the vendor to account of damages for breach of contract."

"On account" or "to account", according to *Chambers' Dictionary*, means "an instalment or interim payment". Clause 5 not only failed, again, to distinguish between deposit and part payment, but went further than providing merely that the sum named shall be forfeited. It was a stipulation that the sum named was not to limit the purchaser's liability for compensation in the event of his default. Not being a genuine covenanted pre-estimate, it could not, of course, be deemed liquidated damages. Therefore, the object and intention of clause 5 was clearly to reserve to the vendors the right to recover damages to any extent, over and above the sum actually received by them, in the event that it should turn out to be inadequate as compensation for their loss. That the natural meaning of these words expressed truly the intention of the contracting parties was supported by the letters of August 27, 1962 and April 9, 1963 from the respondents's solicitors as well as the counterclaim. This view was not disputed by the appellant. The expressed intention being thus the common intention of the parties, in my judgment effect must be given to it. Application of the *contra proferentem* rule is entirely superfluos.

Such being the case I cannot see how an assessment of damages could have been avoided, as it was avoided by the respondents. Since they were entitled to claim more than $377,500 by providing that the quantum of damage should be left at large, the same synallagmatic provision ought to avail the appellant for claiming a refund of any sum in excess of such damage.

In my judgment the respondents in fact sustained no damage by reason of the appellant's breach of contract. Not only was their counterclaim in effect withdrawn, but there is also no doubt that it could hardly have been persisted in with any prospect of success, in the face of the admissions contained in their letter of February 12, 1963. In the absence of any evidence to the contrary, proving violent fluctuations during the relevant period in the value of real estate, the second paragraph of that letter can lead to only one conclusion, that the estate had risen appreciably in value. In the result, whether or not the respondents had gained anything by the appellant's breach of contract, it is at least clear that they suffered nothing by way of damage. Leaving aside the counterclaim, the issue of damage was expressly raised elsewhere by the pleadings, on which the evidence, such as it was, went all one way.

That there was no finding by the trial judge on the question of fact does not, of course, preclude this court from making such finding, where it can readily do so on the evidence. There was no proof of damage. On this point I am entirely satisfied. Nevertheless the respondents were held entitled to retain as much as $377,500 purely because, as a deposit, it amounted to no more than 10 per cent of the purchase price, considered normal and reasonable in other cases of forfeiture of deposits where the purchaser was in default. I do not think that *Tay Say Geok* v. *Warren*[3] can be held up as an appropriate precedent. For one thing, it was the English common law which applied to the contract for sale of land in Malacca, where the distinction is recognised between a penalty and liquidated damages. That doctrine has no application in the instant case, where the contract was governed by our Ordinance and section 74 thereof applies principles wholly different from English law. Moreover, there is another distinction. While in both cases the deposit was similarly expressed to be made "by way of a deposit and in part payment of the purchase price", it was stipulated in the Malacca case that the amount paid *"shall be considered as liquidated damages* and shall be forfeited" in case of default, whereas, here, the parties were *ad idem* that the extent of the purchaser's liabilities remained to be ascertained according to the damage incurred.

Such being the case, where in fact the appellant owed no compensation to the respondents, was he, nevertheless, disentitled by law from claiming any refund? The learned judge held, on the Indian authorities, that sections 65 and 75 of our Contracts Ordinance did not apply to deposits. Hence the cases rereferred to call for close scrutiny. In *Manian Patter* v. *The Madras Railway Company*,[10] a contract for the supply of fuel for a term of 12 months stipulated that the contractor should forfeit his deposit of Rs. 350 upon the contract being rescinded by the company for his default in punctual delivery. The relevant portion of the judgment, which draws a fine distinction between moneys paid and damages to be recovered, reads as follows:—

"Neither section 74 of the Indian Contract Act nor the exposition of law in decisions English or Indian which were referred to in the argument as to *promises to pay specified sums* in case of breach of contract are really in point, for the rule as to penalties dealt with in them has been uniformly held not to be applicable to cases of forfeiture of deposits for the breach of stipulations even where some of them are

but trifling while others are not such (*Wallis* v. *Smith* (5)). In these cases the bargain of the parties is carried out except when the forfeiture is relieved against on terms which the court imposes to meet the justice of the case where the circumstances warrant the grant of such equitable relief. In other words the rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if *reasonable*, in amount."

In *Natesa Aiyer* v. *Appavu Padayachi*,(8) where White C.J. and Miller J. held (Sadasiva Ayyar J. dissenting) that sections 65 and 74 of the Indian Contract Act did not apply to deposits by way of guarantee or security, a contract for the sale of land at the price of Rs. 41,000 had provided for the forfeiture of the deposit of Rs. 4,000 upon default by the purchaser. The majority decision followed *Howe* v. *Smith*,(2) White C.J. expressing the view that, where provisions of the Indian Contract Act were in conflict with English law as laid down in English auhorities, the statute must be followed; nevertheless, the question then before the court was one in which *it was not the intention of the Legislature* to depart from what was understood to be English law at the time when the Indian Contract Act was passed. "Unless, therefore, the defaulting party can obtain relief on grounds of equity, or under some statutory enactment, he is bound by his bargain"; thus said the learned Chief Justice relying strongly on *Howe* v. *Smith*(2) as authority. He continued:—

"As to the Contract Act I do not think section 64 helps the purchaser . . . . .

I also think that section 74, Contract Act, does not apply. The sum of Rs. 4,000 is named in the contract as an 'advance', not as the amount *to be paid* in case of breach. Why should it be assumed that it was paid with a different intention from that stated in the contract? Further, if, as seems to be the right view, it is paid partly by way of part payment of the purchase money and partly by way of security or guarantee for the performance of the contract, it cannot be regarded as a sum named in the contract as the amount to be paid in case of breach. Again, if we are to deal with this case according to the letter of the section, this, as was pointed out by Miller J., in the course of the argument, is not a question of the amount of compensation which the vendor is entitled to receive by reason of the breach, but a question whether the vendee is entitled, under the contract, to recover an amount which has been already paid."

In *Naresh Chandra* v. *Ram Chandra* (13) Moorkerjee J. expressed his view as follows:—

"It is necessary and useful to remember the above distinction and limitation when considering the ambit and scope of particular sections of the Indian Contract Act. In cases of contract, therefore, when any matter cannot be brought within particular provisions of the Indian Contract Act without doing some violence to the language used therein and/or without leading to strange and absurd results, that matter should, in my opinion, be left to be dealt with on established English principles, not inconsistent with justice, equity and good conscience."

He, too, held that section 64, 65 and 74 of the Indian Contract Act had no application because —

"forfeiture of earnest money is not in the nature of damages or compensation for breach of contract, (see *Halsbury's* Laws of England, second edition, volume 29, p. 378, art. 517)."

In the above case reference was made to the 1926 decision of the Privy Council in *Chiranjit Singh* v. *Har Swarup*,(14) where Lord Shaw said:—

"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."

That judgment, however, must be read as qualified by what their Lordships of the Privy Council stated subsequently in *Bhai Panna Singh* v. *Bhai Arjun Singh* (10) as follows:—

"The effect of section 74, Contract Act of 1872, is to disentitle the plaintiffs to recover simpliciter the sum of Rs. 10,000 whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. The only evidence of loss is that of the loss on resale by Rs. 1,000."

In 1947 an extensive review of relevant authorities on section 74 of the Indian Contract Act was made by Mohammad Sharif J. in *Mool Chand Behari Lal* v. *S.D. Chand & Co.*(15) and the learned judge came to the same conclusion as Sadasiva Ayyar J. in *Natesa Aiyar*,(8) as follows:—

"On a review of all these authorities, I think it is quite clear that, whether some amount is paid by way of earnest money or kept in deposit for the due performance of any obligation under the contract, it is always for the court to determine what amount, if any, would be 'reasonable compensation' under the circumstances of a particular case. Section 74 is applicable in all cases where a sum is fixed as the amount payable in case of breach, regardless of the fact whether any actual loss was or was not caused. If the court considers that the sum named is not excessive or unreasonable it shall allow it, or otherwise reduce it to the figure it considers reasonable to allow. In cases where there is no data to estimate the amount of damages actually caused, the discretion of the court is unfettered in allowing what it considers 'reasonable compensation', subject, of course, to the maximum fixed by the parties. Where a party asserts that the amount mentioned as payable in case of breach is a 'genuine pre-estimate of damages', calculated by the contracting parties, and should not on that account be disturbed, it might be established that this is so and the court, if satisfied, will adopt it as 'reasonable compensation' to be awarded. But the final say is with the court and not with the litigant."

Finally, a high-water mark was reached in *Fateh Chand* v. *Balkishan Dass*,(12) a decision of the Supreme Court of India, comprising Sinha C.J. and Gajendragadkar, Wanchoo, Das Gupta and Shah JJ. The judgment of the court on section 74 was as follows:—

"The section is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipu-

lations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties while a stipulation in a contract in terrorem is a penalty and the court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty.

Section 74 declares the law as to liability, upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that, notwithstanding any term in the contract pre determining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstances of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

Accordingly, Indian decisions to the contrary must now be considered as over-ruled by the Supreme Court, including *Natesa Aiyar*, which was specifically referred to. In the instant case the Supreme Court decision would appear to have been overlooked.

As between the two Privy Council decisions in *Chiranjit Singh*[14] and *Bhai Panna Singh*,[10] of 1926 and 1929 respectively, I think the facts in the latter bear sufficient resemblance to provide a precedent for the instant case. It is, at any rate, more consistent with the decision of the Indian Supreme Court, which I would respectfully follow on the interpretation of section 75 of our Contracts Ordinance.

Apart from section 75, there is authority, in my view, for holding that the appellant should be entitled to recover the deposit on the further ground that it was a benefit received by the respondents under the contract, which they were bound to restore, by virtue of the second limb of section 65 of our Contracts (Malay States) Ordinance, which reads:—

"The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, as far as may be, to the person from whom it was received."

On the corresponding section 64 of the Indian Contract Act it has been held in *Muralidhar Chatterjee* v. *International Film Co., Ltd.*[16] that the section applied, notwithstanding that it was the default of the party seeking recovery of his deposit which gave cause to the other party to rescind the contract. As Sir George Rankin said, delivering the judgment of their Lordships of the Privy Council:—

"Their Lordships are not concerned to make the Act agree in its results with the English law. It may be that in such a case as the present the defendants could not in England be made liable to refund any portion of the Rs. 4.000 paid on account, even upon proof that they had sustained no damage by the plaintiff's breaches. That the matter is not quite clear may be inferred from *dicta* in [1924] A.C. 980 at p. 987 and [1939] 1 K.B. 724. It is at least certain that if the party who rightfully rescinds a contract can recover damages from the party in default and is afforded proper facilities of set-off, the Indian legislature may well have thought that his just claims have been met. The fact that a party to a contract is in default affords good reason why he should pay damages, but further exaction is not justified by his default. Where a payment has been made under a contract which has — for whatever reason — become void, the duty of restitution would seem to emerge. A cross claim for damages stands upon an independent footing, though it arises out of the same contract and can be set off."

Following that judgment, which is binding on this court, I would hold that section 65 of our Contracts (Malay States) Ordinance entitles the appellant to restitution, subject to a set-off for any damages which the respondents had sustained.

It follows, then, that the defence to the claim must fail, but to what extent? Should the respondents have to refund the whole amount, or a reasonable proportion thereof? Section 75 entitles the party complaining of a breach to reasonable compensation, whether or not actual loss or damage is proved to have been caused thereby. I have accordingly considered the benefit the respondents received by having the use of $377,502 for 7 years. At 6 per cent per annum the interest earned amounts to $158,550. Assuming, in the alternative, that they had agreed, in the first place, to accept $100,000 as reasonable compensation, $277,500 should have been refunded 7 years ago. At the same rate of interest, the lesser sum should have earned the appellant $116,550, making a total of $394,050 as the proper sum now repayable by the respondents. Fixing the amount of compensation at, say, $100,000 may be open to the criticism that an assessment is made according to a mere whim or fancy, which would be true. Therefore, after careful consideration, I would exercise my discretion with an even hand by ordering that the whole sum of $377,500 be refunded, but without interest, except as from date of judgment at 6 per cent per annum. The appellant will have the costs throughout.

Suffian F.J.: With respect I agree with my Lord Chief Justice that this appeal be

allowed, but, in view of the importance of this case to both parties by virtue of the magnitude of the amount involved, and of the principle involved to members of the legal profession who have to advise sellers and buyers of landed property, it is, I think, desirable that I should state what I understand is the law on the question posed before us and my reasons for coming to the conclusions that the buyer in this case is entitled to recover his deposit.

My Lord Chief Justice has stated the facts so well that I am spared the labour of setting them out myself and I can straightaway deal with the law as I see it.

At the outset it is important to remember that the land concerned (Haron Estate) is within the Malay States where the Contracts (Malay States) Ordinance No. 14 of 1950 applies and that law is not necessarily the same as the common law which applies to the law of contract in England which is followed in Malacca and Singapore which formed the old Straits Settlements.

The Contracts (Malay States) Ordinance is, however, the same as the Indian statute governing contracts in India, and it is fortunate that the point that has arisen here has been litigated twice in pre-independence India right up the Privy Council, and I cannot do better than begin by dealing with these two decisions, and then deal with a recent decision of the Indian Supreme Court that was not cited before the learned trial judge.

In the first of these Privy Council decisions, *Chiranjit Singh* v. *Har Swarup*,[14] property was sold on the following terms. The price was Rs. 476,000 the buyer was to pay Rs. 20,000 earnest money and the balance in two equal instalments, the first payable on executing the conveyance and the last within six months. The buyer had financial difficulties in carrying out the contract, and so did not pay the earnest money as such, but on 28th August, 1914, he sent two cheques, amounting in all to Rs. 165,000, "towards the sale price . . . . out of the consideration of Rs. 476,000".

The High Court found that the buyer was unable or unwilling to complete the contract even in its modified form and decided that, as he had broken the contract, he was to lose his earnest money of Rs. 20,000 but must be repaid Rs. 145,000.

The buyer appealed to the Privy Council to obtain repayment of the earnest money. The Privy Council held that he could not recover. Lord Shaw stated at page 2:—

> "Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reasons of the fault or failure of the vendee."

In the second Privy Council decision, *Bhai Panna Singh & Ors.* v. *Bhai Arjun Singh & Ors.*,[10] property was sold for Rs. 105,000 by an agreement dated 18th February, 1924. The buyers were to pay Rs. 500 earnest money and "The party retracting from the contract shall pay Rs. 10,000 as damages". No time was fixed for completion, but on the same day the buyers paid the earnest money and were given a receipt which provided that the balance should be received before the Sub-Registrar and the deed registered within a month. On 26th April a conveyance was drawn up in the presence of the buyers but not of the sellers. On the same day there was a fight between a Sikh and a Mahomedan on the premises (which contained a mosque) and the buyers did not complete the purchase. On the 9th June the sellers sold the property to another buyer for Rs. 104,000. On 1st October they issued a plaint claiming Rs. 10,000 and further damages.

The Privy Council agreed with the subordinate judge's finding that the buyers postponed completion from time to time for their convenience and eventually broke the contract. Lord Atkin, in giving the advice of the Privy Council, said at page 180:—

> ". . . . The only question that remains is as to the amount of the damages.
>
> The effect of section 74, Contract Act of 1872 [corresponding to section 75 of our Contract (Malay States) Ordinance], is to disentitle the [sellers] to recover simpliciter the sum of Rs. 10,000 whether penalty or liquidated damages. The [sellers] must prove the damages they have suffered. The only evidence of loss is that of the loss on re-sale by Rs. 1.000."

Coming now to the Indian Supreme Court decision, *Fateh Chand* v. *Balkishan Dass*,[12] there a bungalow was sold by an agreement dated 21st March, 1949, providing that:—

(a) Rs. 1,000 were to be paid to the seller as earnest money at the time of the execution of the agreement;

(b) the seller was to deliver complete vacant possession of the bungalow to the buyer on 30th March, 1949, and the buyer was to give the seller another cheque for Rs. 24,000 "out of the sale price"; and

(c) the seller was to get the deed registered by 1st June, 1949. If the seller failed to do so, the sum of Rs. 25,000 was to be forfeited and the buyer was to return the bungalow to the seller, but if the registration was delayed because of the seller, then he was to pay a further sum of Rs. 25,000 as damages.

On 21st March, 1949, the buyer paid Rs. 1,000 "earnest money',. On 25th March the seller received Rs. 24,000 and delivered posses-

sion of the property to the buyer, but the sale was not completed within the time stipulated.

The seller claimed that he was entitled to forfeit the Rs. 25,000. He also claimed possession of the property and a decree for Rs. 6,500 compensation for use and occupation of the property by the buyer.

The Attorney-General, appearing on behalf of the buyer in the Supreme Court, did not challenge the seller's right to forfeit the earnest money of Rs. 1,000.

He however argued that the seller could not forfeit the Rs. 24,000 because the covenant which gave to the seller the right to forfeit this amount was "a stipulation in the nature of a penalty" within the meaning of section 74 of the Contract Act and the seller could retain that amount or part thereof, only if he established that in consequence of the breach by the buyer, he had suffered loss, and in the view of the court the amount or part thereof was reasonable compensation for that loss.

The Supreme Court at page 1410 agreed with the Attorney-General that the amount of Rs. 24,000 was not earnest money and that under section 74 the seller was only entitled to *reasonable* compensation, not exceeding the amount specified in the contract as liable to forfeiture.

The Supreme Court drew a distinction between earnest money and part payment of purchase price. At page 1410 Shah J., delivering the judgment of the court, said:—

> ".... The agreement expressly provided for payment of Rs. 1,000 as earnest money, and that amount was paid by [the buyer]. The amount of Rs. 24,000 was to be paid when vacant possession of the land and building was delivered and it was expressly referred to as 'out of the sale price'. If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale."

It is plain from the above three authorities that in India when money is paid by a buyer of property, it could be either earnest money or it could be part of the purchase price, that earnest money is to secure the completion of the bargain, that it forms part of the purchase price if the bargain goes through, but it is forfeited if the bargain does not go through by reason of the buyer's default. It will thus be seen that earnest money changes in character during the course of the transaction, whereas money paid as part of the purchase price always remains such throughout the transaction and if the bargain falls through it may not be forfeited but is returned to the buyer.

So much for the law in India.

It is, however, said that the money paid by the buyer here was "by way of deposit and part payment", that these were the very words use to describe the money paid in the English transaction in *Howe* v. *Smith,*[2] and in the Malacca transaction in *H.G. Warren* v. *Tay Say Geok* [3] and that like the payment in these two cases, the money paid in the instant case should also be forfeited.

The headnote of *Howe* v. *Smith* [2] reads as follows:—

> "On a sale of real estate the [buyer] paid £500, which was stated in the contract to be paid 'as a deposit, and in part payment of the purchase money'. The contract provided that the purchase should be completed on a day named, and that if the [buyer] should fail to comply with the agreement, the [seller] should be at liberty to resell and to recover any deficiency in price as liquidated damages. The [buyer] was not ready with the purchase money and after repeated delays the [seller] resold the property for the same price.
>
> The original [buyer] having brought an action for specific performance, it was *held* by the Court of Appeal affirming the decision of Kay J. that the [buyer] had lost by his delay his right to enforce specific performance.
>
> **Held,** also, that the deposit, although to be taken as part payment if the contract was completed, was also a guarantee for the performance of the contract, and that the [buyer], having failed to perform his contract within a reasonable time, had no right to a return of the deposit."

In *H.G. Warren* [3] the buyer agreed to buy a rubber estate in Malacca and paid down $90,000 (approximately 10% of the purchase price) "by way of deposit and in part payment" which was to be considered "as liquidated damages and should be forfeited" by the sellers in the event of failure by the buyer to pay the balance of the purchase price and when the buyer failed to complete the transaction within the stipulated time, it was held by the Privy Council that he could not recover the deposit.

I regret that I do not agree that the common law in this matter is different from the law in India and I find support for my view in the following case.

In *Mayson* v. *Clouet & Anor,*[17] an appeal from Singapore, a contract for the sale of land provided that a deposit should be paid immediately, and that the instalments of cash (being 10% of the rest of the agreed price) should be paid at certain dates and that the balance of the price should be paid within ten days of a given time; if the buyer failed to comply with the conditions of the contract, his deposit might be forfeited and the land resold. The buyer paid the deposit and the two instalments, but failed to pay the balance of the price at the stipulated time. The seller rescinded the contract. It was held by the Privy Council, reversing the Supreme Court of Singapore, that there was a distinction between deposits (which were forfeitable) and instalments (which were recoverable).

Lord Dunedin, who gave the advice of the Privy Council, first dealt with *Howe* v. *Smith* [2] in words which clearly showed that in English law there is a distinction between deposit on the one hand and part payment of the purchase price on the other. He said at page 985:—

"In *Howe* v. *Smith* £500 was paid as deposit and part payment of the purchase money. The contract was to be completed by a certain date, and it was not so completed and the [sellers] sold to some one else. The [buyer] sued for specific performance, which was refused, as he himself had been in default, and then, being allowed to amend his pleadings, the sued for return of the deposit. It was held that the deposit being of the nature of a guarantee that the contract should be performed, was forfeited and could not be returned. Cotton L.J. says 'the first thing one must look at is the contract', and Bowen L.J., 'the question as to the right of the [buyer] to the return of the deposit money must, in each case, be a question of the conditions of the contract,' and Fry L.J. to the same effect. . . . *Howe* v. *Smith* clearly comes to this, that *if the learned judges had held that the deposit was only part payment and not a deposit proper, they would have ordered its return.* Fry L.J. put this very simply: 'It (the deposit) is not merely a part payment, but is then also an earnest to bind the bargain.' "

Then coming to the particular Singapore contract, he said at page 987:—

"[The contract] specially distinguishes in terms between deposits and instalments. It then specially deals in clause 13 with what is to happen if the [buyers] are in default. The deposit is forfeited, and that is all. It would seem to their Lordships quite clear that the instalments are not to be forfeited. The truth is that the [seller's] contention really amounts to a claim to keep the instalments as liquidated damages for the breach of contract for which they are entitled to sue."

The law both in India and in England seems to be this, that where earnest money is paid by an intending purchaser of property there is thereby constituted a contract within a contract, there is, as it were, a minor contract within the main contract. The main contract relates to the whole transaction consisting of payments and leading ultimately to completion. The minor contract within this main contract is an agreement that the buyer is to pay some thing to show that he is in earnest about his bargain and that, while it is true that if the bargain goes through this payment is to go towards the purchase price, it is to be forfeited if the bargain falls through. There is nothing unfair to the buyer in this arrangement because once the agreement has been made and the seller has accepted payment of the earnest money the seller is precluded from accepting a higher offer from another buyer; the seller is held to his bargain even on a rising market for so long as the buyer is prepared to perform his part of the bargain. And to determine whether the money paid is earnest money or not, one must look at the agreement concerned.

On a proper constructon of the agreement here, can it be said that the money paid by the buyer was earnest money to guarantee the completion of the bargain? It could have been earnest money if the parties had, in the words of Shah J. in the Indian Supreme Court decision cited, "so named it in the agreement of sale", or used other words to make their intention clear beyond all doubt. But it had not been so named, and reading the agreement as a whole and considering the subsequent conduct of the seller as revealed by the correspondence and the turn of events at the trial in the lower court, I am of the opinion that there is an ambiguity as to the exact intention of the parties and in my view this ambiguity should be resolved in favour of the buyer and I accordingly hold that the money paid was not earnest money.

If it was not earnest money, then it must be recoverable unless excluded by section 75 of the Contracts (Malay States) Ordinance. It is said that that section applies only where the party complaining of the breach seeks to recover, that the buyer in the instant case is not a person complaining of the breach and that in fact he it is who has broken the contract, that it is he who is suing for the return of money paid and that section 75 precludes him from recovering.

In *Natesa Aiyar* v. *Appavu Padayashi,* [8] Madras High Court held that section 74 of the Indian Contracts Act only applies where the sum is named as a penalty to be paid *in future* in case of breach, and not in cases where a sum has *already* been paid and by a covenant in the contract it is liable to forfeiture.

This has, however, been overruled by the Indian Supreme Court decision already cited. Shah J. said at page 1412:—

"But the application of the enactment is not restricted to cases where the aggrieved party claims relief as the plaintiff. The section [74] does not confer a special benefit upon any party: it merely declares the law that, notwithstanding any term in the contract predetermining damages or providing forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression 'to receive from the party who has broken the contract' does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract."

With respect I agree with the principle enunciated in the above case and therefore I hold that the defendant seller is not entitled to forfeit the deposit but is only entitled to *reasonable* compensation not exceeding $377,500, the sum named in the agreement.

What is a reasonable amount? As has been said by my Lord Chief Justice, the seller has had the use of $377,500 for seven years which, if invested at 6% per annum, would have brought him $158,550 and this is sufficient compensation for him. For the reasons given by my Lord Chief Justice, I agree that justice will be served by ordering the seller to refund this money to the buyer without interest except as from the date of this judgment he should pay interest at 6% per annum. The buyer will have the costs throughout.

I have not said anything as to the effect of section 65 of the Contracts (Malay States) Ordinance and I have not done so, because in the lower court the buyer relied on it only half-heartedly and before us he concedes that it does not apply at all.

Ali F.J. concurred.

Appeal allowed.

Solicitors: *Maxwell Kenion, Cowdy & Jones; Shearn Delamore & Co.*

IN RE G.G. PONNAMBALAM

[O.C.J. (Ong Hock Thye C.J. (Malaya)) July 26, 1969]

[Kuala Lumpur—Petition for Admission No. 40 of 1969]

Advocates and Solicitors — Admission — Special grounds — Shortening of period of posting of notice — Dispensation of reading in chambers — What are special grounds — Discretion of court — Public interest — Advocates and Solicitors Ordinance, 1947, ss. 5, 6, 7 and 8.

In this case the petitioner, a Queen's Counsel, had applied for admission as an advocate and solicitor of the High Court in Malaya and asked that the court's discretion be exercised to shorten the statutory period of posting of the notice under section 5(2) of the Advocates and Solicitors Ordinance, 1947 as well as to dispense with reading in chambers as required by section 5(3). The question for decision was whether this was a proper case for the exercise of the court's discretion in accordance with the provisions of section 5(5) of the Ordinance.

Held: (1) pre-eminence in the profession is not *per se* a special ground nor does reasonableness of the application constitute a special ground but the court must be satisfied that there are special grounds for the exercise of its discretion and that it is in the public interest or otherwise that the normal procedure for admission should not be followed;

(2) in this case no special grounds had been shown and therefore no order will be made.

Cases referred to:—

(1) *Re Goff Q.C.* [1962] M.L.J. 241.

(2) *In re Shawcross* [1956] M.L.J. 104, 108.

(3) *Re D.N. Pritt Q.C.* [1954] M.L.J. xxiii.

(4) *Re Dingle Foot* [1964] M.L.J. 379, 380.

(5) *Re Ironside* [1958] M.L.J. 152, 153.

(6) *In re Atkinson* [1947] M.L.J. 160, 161.

(7) *R.* v. *Bedfordshire* 24 L.J. Q.B. 84.

PETITION FOR ADMISSION.

J.B. Jeyaretnam (*M. Abraham* with him) for the petitioner.

Ajaib Singh (Senior Federal Counsel) on behalf of the Attorney-General, Malaysia.

Dr. R. Ramani (*Khoo Eng Chin* and *M.S. Naidu* with him) on behalf of the Bar Committee, Selangor.

K.A. Menon on behalf of the Bar Council, States of Malaya.

Ong Hock Thye C.J.: This is a petition for admission as an advocate and solicitor of the High Court in Malaya, which necessarily involves shortening of the statutory period of posting of the notice under sub-section (2) of section 5 of the Advocates and Solicitors Ordinance 1947, as well as dispensation of reading in chambers as required by sub-section (3) of the same section. These two prayers would have to be allowed before the petition for admission can be entertained. The petitioner asks that the discretion of the court be exercised accordingly, under the provisions of sub-section (5), of which the relevant portion reads as follows:—

> "(5) The court may, on application and on special grounds, one of which may be that the petitioner has been engaged in any part of Her Majesty's dominions in the active practice of his profession after having qualified as a Barrister of England ....., to be stated on affidavit or statutory declaration ..... by order shorten the period during which the notice referred to in sub-section (2) of this section is required to be posted and may by order shorten or dispense with the period during which the petitioner is required to attend and receive instruction in law in an office or to read in chambers, and may, if it thinks fit, admit and enrol the petitioner at any time."

The petitioner is Mr. G.G. Ponnambalam, Q.C., who was called to the English Bar on January 26, 1927 and admitted and enrolled an advocate of the Supreme Court of Ceylon on May 6, 1927. He has since been engaged in the active practice of his profession there. In 1948 he was appointed one of His Britannic Majesty's Counsel in Ceylon. He is the leader of the Bar on the criminal side and had been engaged in several *causes célèbres* in that country.

At the close of a preliminary enquiry held in March and April 1969, Dr. Saw Hock Chuan and his brother Mr. Saw Hock Beng, prominent residents of Kuala Lumpur, have been committed to stand trial with certain others in the High Court at Kuala Lumpur, on charges of criminal breach of trust, punishable under section 409 of the Penal Code. Against Dr. Saw alone there is an additional charge of abetment of